NO. 84-1198

In the Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF TEXAS,

Petitioner,

v.

SANFORD JAMES McCULLOUGH,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

JOINT APPENDIX

RANDALL L. SHERROD,
Criminal District Attorney,
Randall County, Texas

* DEANE C. WATSON,
Assistant Criminal District
Attorney of Randall County,

Randall County Courthouse,
Canyon, Texas 79015
Phone (806) 655-2188

Counsel for Petitioner

Law Offices of Mann & Laney
600 Ash Street,
Plainview, Texas, 79073
Phone (806) 293-2618

* MARK W. LANEY
600 Ash St.,
Plainview, Texas 79073

JOHN MANN
310 West 6th St.,
Amarillo, Texas 79101

Counsel for Respondent

* Counsel of Record

PETITION FOR CERTIORARI FILED FEBRUARY 23, 1985
CERTIORARI GRANTED JUNE 10, 1985

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RELEVANT DOCKET ENTRIES

First Trial

CRIMINAL DOCKET

Number of Case	STYLE OF CASE	ATTORNEYS
3237-C FEE BOOK Vol / Page	THE STATE OF TEXAS vs Sanford James McCullough	Randall Sherrod State John Mann (App.) Defendant

Date of Orders	ORDERS OF COURT
4 21 80	Def. appeared & filed affidivit of inability to employ Counsel. Appointed John Mann, Set for trial June 9, 1980 & pre-trials on May 23, 1980. Bond set at $50,000 ret. instanter. Defendant's Waiver of Arraignment & Order Accepting.
5 29 80	Defendant's Motion for Appointment of an Investigator & Order Appointing Jim Patterson.
7 01 80	Defendant's 1st motion for Continuance.
7 14 80	Order for Continuance to 8-11-80.
7 18 80	Def. appeared with his attorney for hearing on pre-trial Motions State appeared through ass't C.D.A. Wes Clayton. All parties announced ready on pre-trial Motions. Confession held admissible.
8 01 80	Def. attorney & D. A. appeared hearing on pre-trials Motions.
8 11 80	States 1st Motion for Continuance & Order granting.

Number of Case	STYLE OF CASE	ATTORNEYS
3237-C FEE BOOK Vol / Page	THE STATE OF TEXAS vs Sanford James McCullough	Randall Sherrod State John Mann (App.) Defendant

Date of Orders	ORDERS OF COURT
9 22 80	Def. appeared with his attorney & state appeared through its attorney Randy Sherrod Criminal Dist. Attorney & Wes Clayton. All parties announced ready. Jury instructed & Voir Dired by Counsel. Challenges made. Jury sworn and instructed, Indictment read, pled not guilty. Evidence received. Both sides rested & closed. Jury recessed 9:30 a. m. September 23, 1980.
9 23 80	Objections to the Charge overruled.
9 23 80	Arguments of attorneys. 10:23 a. m. Jury retired to deliberate, 3:55 p.m. Jury returned with verdict of guilty. Charge to jury on punishment. Arguments of Counsel. Jury retired to deliberate, Jury returned a verdict of 20 years, Def. took 10 days to file Motions — to return Oct. 6, 1980.
10 03 80	Motion for New Trial
10 06 80	Motion for New trial joined by D. A. granted, Def. present represented by John Mann, State present.
11 03 80	Def.'s application for Change of Venue.
11 04 80	State's Controverting Affidavit.

Number of Case	STYLE OF CASE	ATTORNEYS
3237-C FEE BOOK Vol / Page	THE STATE OF TEXAS vs Sanford James McCullough	Randall Sherrod State John Mann (App.) Defendant

Date of Orders	ORDERS OF COURT
11 08 80	Def. & Atty Mann Asst. D. A. Clayton. All parties announced ready for hearing. Change Venue denied. Case re-set Dec. 8, 1980 at 9:00 a. m., pre-trial Motions ruled on.
6 12 81	Order of Dismissal signed & entered Reindicted 3442-C

Indictment

First Trial

IN THE NAME AND BY AUTHORITY
OF THE STATE OF TEXAS:

The Grand Jurors for the County of Randall, State of Texas, duly selected, impaneled, sworn, charged and organized as such at the January Term, A.D. 1980, of the 251st District Court of said County, upon their oaths present in and to said Court, that SANFORD JAMES McCULLOUGH, on or about the 5th day of April, A.D. 1980, and before the presentment of this indictment, in said County and State, did then and there intentionally and knowingly cause the death of George Preston Small by stabbing him with a knife, AGAINST THE PEACE AND DIGNITY OF THE STATE.

Richard Ware II
Foreman of the Grand Jury.

First Trial

NO. 3237-C

The State Of Texas	X	In The 251st District Court
vs.	X	In And For
Sanford James McCullough	X	Randall County, Texas

CHARGE OF THE COURT

MEMBERS OF THE JURY:

The defendant, SANFORD JAMES McCULLOUGH, stands charged by indictment with the offense of murder, alleged to have been committed in Randall County, Texas, on or about the 5th day of April, 1980.

To this charge the defendant has pleaded not guilty.

You are instructed that the law applicable to this case is as follows:

1.

Our law provides that a person commits the offense of murder if he intentionally or knowingly causes the death of an individual.

2.

"Person" means an individual. "Individual" means a human being who has been born and is alive.

"Another" means a person other than the accused.

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objectives or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts

knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

3.

A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.

Each party to an offense may be charged with the commission of the offense.

A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.

Mere presence alone will not make a person a party to an offense.

4.

Now, therefore, if you find and believe from the evidence beyond a reasonable doubt that on or about the 5th day of April, 1980, as alleged in the indictment, the defendant, SANFORD JAMES McCULLOUGH, either acting alone or with another as a party to the offense, as that term has been hereinbefore defined in Paragraph 3, did then and there intentionally or knowingly cause the death of George Preston Small by stabbing him with a knife, then you will find the defendant, SANFORD JAMES McCULLOUGH, guilty of the offense of murder.

Unless you so find and believe beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant, SANFORD JAMES McCULLOUGH, not guilty of the offense of murder.

5.

The only function of the jury under this charge is to determine the guilt, if any, of the defendant or the innocence of the defendant according to the directions

and instructions contained herein, the matter of punishment, should you find the defendant guilty, being the subject of further proceedings in the trial.

6.

You are instructed that a grand jury indictment is not evidence of guilt. It is the means whereby a defendant is brought to trial in a felony prosecution. It is not evidence, nor can it be considered by you in passing upon the innocence or guilt of this defendant.

7.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial.

8.

In all criminal cases, the burden of proof is on the State and never shifts to the defendant. The defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt; and in case you have a reasonable doubt as to defendant's guilt after considering all the evidence before you and these instructions, you will acquit the defendant and say by your verdict "Not Guilty."

9.

You are the exclusive judges of the facts proved, of the credibility of the witnesses and of the weight to be given to their testimony, but you are bound to receive the law from the Court which is here given to you in these written instructions, and you must be governed thereby.

10.

During your deliberations in this case, you must not consider, discuss or relate any matters not in evidence

before you. You should not consider or mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

11.

After you have retired to the jury room, you should select one of your members as your foreman. It is his duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by signing the same as foreman.

12.

After you have retired to the jury room, no one has any authority to communicate with you except the officer who has you in charge. You may communicate with this Court in writing through the officer who has you in charge. Do not attempt to talk to the officer who has you in charge, or the attorneys or the Court, or anyone else concerning any question you may have.

13.

After you have arrived at your verdict, you may use one of the verdict forms attached hereto by having your foreman sign his name to the particular form that conforms to your verdict, but in no event shall he sign more than one of such forms.

Naomi Harney
Judge Presiding

Additional Instructions Following Jury's Questions During Deliberations

MEMBERS OF THE JURY:

In view of your request for reading of certain portions of the testimony, I instruct you that the rule is as follows:

> "If the jury disagree as to the statement of any witness, they may, upon applying to the Court, have read to them from the court reporter's notes that part of the witness' testimony on the point in dispute."

In accordance with the rule, you are instructed that a request to have the court reporter's notes read cannot be complied with unless the jury disagree as to the statement of the witness. Therefore, it will be necessary for you to certify that you are in dispute as to the statement of a witness, and you should request that part of the witness' statement on the point in dispute, and only on that point which is in dispute.

Naomi Harney
Judge Presiding

#3237-C
THE STATE OF TEXAS
VS. SANFORD JAMES McCULLOUGH

VERDICT

We, the jury, find the defendant, SANFORD JAMES McCULLOUGH, not guilty.

(not signed)
Foreman of the Jury

* * * * *

We, the jury, find the defendant, SANFORD JAMES McCULLOUGH, guilty of the offense of murder, as alleged in the indictment.

Deborah Welch
Foreman of the Jury

NO. 3237

The State Of Texas — In the 251st District

vs. — Court

Sanford McCullough — Randall County, Texas

Comes now the defendant and elects that punishment in this cause, if any, be assessed by the jury.

Sanford McCullough, Jr.
Defendant

NO. 3237-C

The State Of Texas	X	In The 251st District Court
vs.	X	In And For
Sanford James McCullough	X	Randall County, Texas

CHARGE OF THE COURT

MEMBERS OF THE JURY:

By your verdict returned in this case, you have found the defendant, SANFORD JAMES McCULLOUGH, guilty of the offense of murder, as charged in the indictment, which was alleged to have been committed in Randall County, Texas, on or about the 5th day of April, 1980.

It now becomes your duty to assess the punishment within the limits prescribed by law.

1.

You are instructed that the punishment for the offense of murder is by confinement in the Texas Department of Corrections for life or for any term not more than 99 years or less than five years, and in addition you may assess a fine not to exceed $10,000.00.

Therefore, you will assess the punishment upon said finding of guilt at life or at any term of not more than 99 years or less than five years, and in addition, you may assess a fine not to exceed $10,000.00.

2.

You are instructed that you cannot, and you must not, render any quotient verdict; that is, in arriving at any penalty or term of punishment, you are not to arrive at the same by setting down the term, amount or degree of punishment favored by each juror, adding the same and

dividing by twelve, the number of jurors; nor are you to arrive at such penalty in any other manner than by discussion of the evidence bearing thereon.

3.

In determining the punishment in this case, you are instructed that you are not to discuss among yourselves how long the defendant will be required to serve any sentence you decide to impose. Such matters come within the exclusive jurisdiction of the Board of Pardons and Paroles and the Governor of the State of Texas and are no concern of yours.

4.

You, the jury, are the exclusive judges of the credibility of the witnesses, of the weight to be given the evidence and of the facts proved, but you are bound to receive the law from this Court as given in this charge and be governed thereby.

5.

After you have retired to the jury room, it is the duty of your foreman to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by signing his name as foreman to one of the verdict forms attached hereto, but in no event shall he sign more than one of such forms.

6.

After you have retired to the jury room, no one has any authority to communicate with you except the officer who has you in charge. You may communicate with this Court in writing through the officer who has you in charge. Do not attempt to talk to the officer who has you in charge, or the attorneys or the Court, or anyone else concerning any question you may have.

Naomi Harney
Judge Presiding

#3237-C - THE STATE OF TEXAS
VS. SANFORD JAMES McCULLOUGH

VERDICT FORMS

We, the jury, having found the defendant guilty as charged in the indictment, assess his punishment at confinement in the Texas Department of Corrections for 20 years.

Deborah Welch
Foreman of the Jury

* * * * *

We, the jury, having found the defendant guilty as charged in the indictment, assess his punishment at confinement in the Texas Department of Corrections for _____ and, in addition to such confinement, assess a fine of $_____.

(not signed)
Foreman of the Jury

NO. 3237-C

The State of Texas	X	In The 251st District Court
vs.	X	In And For
Sanford James McCullough	X	Randall County, Texas

JUDGMENT

On the 22nd day of September, 1980, the above entitled and numbered cause was regularly reached and called for trial, and came the State of Texas by and through her Criminal District Attorney, Randall L. Sherrod and her Assistant Criminal District Attorney, Wesley G. Clayton, and the defendant, SANFORD JAMES McCULLOUGH, appeared in person and in open court, his counsel, John Mann, also being present, and the said defendant, SANFORD JAMES McCULLOUGH, having been duly arraigned, and having pleaded not guilty to the indictment herein, both parties announced ready for trial; and thereupon a jury, to-wit: Deborah Welch and eleven others, was duly selected, impaneled and sworn, who, having heard to the evidence submitted, the Court's charge, and the argument of counsel, retired in charge of the proper officer to consider its verdict, and afterward was brought into open court by the proper officer, and the defendant and his counsel also being present, and returned into open court the following verdict, which was received by the Court, and is now entered upon the Minutes of this Court, to-wit:

> "We, the jury, find the defendant, SANFORD JAMES McCULLOUGH, Guilty of the Offense of Murder, as charged in the indictment.
>
> *Deborah Welch*
> Foreman of the Jury"

Thereupon the jury, having heard additional evidence on the punishment and the argument of counsel for the State and for the defendant, assessed punishment of the defendant at confinement in the Texas Department of Corrections for a term of twenty (20) years.

THE COURT FURTHER FINDS that the defendant used a deadly weapon as defined in §1.07 (a) 11, Texas Penal Code, during the commission of a felony offense.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the defendant, SANFORD JAMES McCULLOUGH, is guilty of the offense of Murder, as charged in the indictment, and as found by the jury, said offense having been committed on the 5th day of April, 1980, and that he be punished by confinement in the Texas Department of Corrections for a term of twenty (20) years; and that the State of Texas do have and recover of said defendant all costs in this proceeding incurred, for which let execution issue, and that the said defendant be remanded to jail to await the further orders of this Court.

Naomi Harney
Judge Presiding

NO. 3237-C

The State Of Texas	X	In The 251st Judicial
vs.	X	District Court In And For
Sanford James McCullough	X	Randall County, Texas

DEFENDANT'S MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes SANFORD JAMES McCULLOUGH, Defendant in the above styled and numbered cause, by and through his court-appointed attorney of record, JOHN MANN, and makes and files this his Motion for New Trial and would respectfully show unto the Court as follows:

I.

The Trial Court erred in not granting Defendant's Motion for Mistrial subsequent to the prosecutor's improper jury argument concerning the fact that the jury, if they only gave the Defendant ten or fifteen years in the penitentiary, would look outside their window at the end of that period of time and wonder if the criminal out there was the Dedendant.

II.

The Trial Court erred in overruling Defendant's Motion for Mistrial subsequent to the prosecutor's cross-examination of the witness, DENNIS McCULLOUGH, as to a purported "confession" given by a Co-Defendant, KENNETH McCULLOUGH. Such conduct constituted error in light of *Bruton vs. United States.*

WHEREFORE, PREMISES CONSIDERED, Defendant

prays that this Motion for New Trial be set for hearing and that upon such hearing, said Motion be in all things granted.

Respectfully submitted,

MANN & McCONNELL
Attorneys at Law
310 West Sixth Street
Amarillo, Texas 79101
(806) 372-5711

By *John Mann*

ATTORNEY FOR DEFENDANT

ORDER SETTING HEARING

The Court, after considering Defendant's Motion for New Trial, is of the opinion that such Motion should be set for hearing:

IT IS THEREFORE ORDERED that Defendant's Motion for New Trial, be, and it is, set for hearing on the _____ day of _____, 1980, at _____ o'clock _____. M.

SIGNED this _____ day of October, 1980, in chambers.

_____
Judge Presiding

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing Defendant's Motion for New Trial and Order Setting Hearing has this the 3rd day of October, 1980, been furnished to Mr. Randall Sherrod, Criminal District Attorney, Randall County Courthouse, Canyon, Texas, by hand delivery.

John Mann

NO. 3237-C

The State Of Texas	X	In The 251st District Court
vs.	X	In And For
Sanford James McCullough	X	Randall County, Texas

ORDER GRANTING NEW TRIAL

This the 6th day of October, 1980, came on to be heard the Motion of the defendant, SANFORD JAMES McCULLOUGH, for new trial in the above entitled and numbered cause; and said motion having been presented to the court in due time, manner and form, with due notice, and with the District Attorney agreeing with said motion,

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED that the same be and is hereby granted.

Naomi Harney
Judge Presiding

RELEVANT DOCKET ENTRIES

Second Trial

CRIMINAL DOCKET

Number of Case	STYLE OF CASE	ATTORNEYS
3442-C FEE BOOK Vol / Page	THE STATE OF TEXAS vs. Sanford James McCullough	Randall Sherrod, State John Mann, Defendant

Date of Orders	ORDERS OF COURT
12 09 80	Order transferring to the 251st District Court
12 11 80	Def. appeared with his attorney John Mann. Def. waived 10 days to prepare for trial & two days for arraignment. Def. arraigned. Def. request that the record in 3237-C be transferred and made a part of the record in this case. Def. attorney John Mann, Dist. Attorney Sherrod all announced ready for trial. Jury instructed and Voir Dired by attorneys Challenges made. Jury sworn & instructed. Indictment read. Def. plea not guilty. Evidence heard. State rested. Jury recessed until 9:00 a. m. 12-12-80.
12 12 80	Def. rested State & Def. closed. Jury charged Arguments by Counsel. 11:04 a. m. Jury retired to deliberate 3:55 p. m. Jury returned a verdict of guilty. Punishment set by the Court at 50 years in T. D. C.
12 29 80	Hearing on Motion for New trial. Motion overruled. Def. Sentenced.

Number of Case	STYLE OF CASE	ATTORNEYS
3442-C	THE STATE OF TEXAS vs Sanford James McCullough	Randall Sherrod, State John Mann, Defendant

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Date of Orders	ORDERS OF COURT
12 29 80	State appeared by her Assistant Criminal District Attorney, Dean Watson, and the Defendant appeared in person and with counsel, John Mann. Defendant announced ready to accept sentence. Defendant was sentenced to confinement in the Texas Department of Corrections for not more than fifty years nor less than five years and was remanded to the custody of the Randall County Sheriff until said Sheriff can obey the directions of said sentence. Defendant was advised of his right to appeal and that he was entitled to have an attorney appointed by the Court to represent him on appeal if he could not afford an attorney, and the Defendant in open court gave notice of appeal to the Court of Criminal Appeals and requested that the Court appoint an attorney.
12 29 80	Judgement and sentence signed and entered.
01 06 81	Notice of Appeal and Motion for Findings of Fact.
01 08 81	Order overruling Defendant's Motion for New Trial signed and entered.
02 24 81	Order in response to the Def.'s Motion for Findings of Fact.

Number of Case	STYLE OF CASE	ATTORNEYS
3442-C	THE STATE OF TEXAS vs Sanford James McCullough	Randall Sherrod, State John Mann, Defendant

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Date of Orders	ORDERS OF COURT
4 23 81	Order Approving Record without Hearing
6 12 81	Order extending time for filing Appellant's brief
8 18 81	Order extending time for filing Appellee's brief

Indictment

Second Trial

IN THE NAME AND BY AUTHORITY
OF THE STATE OF TEXAS:

The Grand Jurors for the County of Randall, State of Texas, duly selected, impaneled, sworn, charged and organized as such at the July Term, A.D. 1980, of the 181st District Court of said County, upon their oaths present in and to said Court, that SANFORD JAMES McCULLOUGH, on or about the 5th day of April, A.D. 1980, and before the presentment of this indictment, in said County and State, did then and there intentionally and knowingly cause the death of an individual, George Preston Small, by stabbing him with a knife, AGAINST THE PEACE AND DIGNITY OF THE STATE.

James Pat Scarborough
Foreman of the Grand Jury.

Second Trial

NO. 3442-C

The State Of Texas	X	In The 251st Judicial
vs.	X	District Court In And For
Sanford James McCullough	X	Randall County, Texas

ELECTION ON PUNISHMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW SANFORD JAMES McCULLOUGH, Defendant in the above-styled and numbered cause, and files this his election in writing with regard to the assessment of punishment, if any, in this cause and in support thereof would respectfully show the Court as follows:

I.

The election to have punishment assessed by the jury was filed by the Defendant in the above-styled and numbered cause prior to the beginning of a prior trial in this cause, which trial ended in a new trial being granted.

II.

The above-styled and numbered cause is being tried this, a second time, as the result of the Court setting aside the verdict of the jury and a judgment of conviction heretofore rendered against the Defendant in the above-styled and numbered cause.

Therefore, the case having been returned to a posture of no conviction having been entered against the Defendant, the Defendant, hereby elects that at the trial of the above-styled and numbered cause scheduled to begin on December 10, 1980, the punishment, if any, assessed against the

Defendant in the case of a conviction be assessed by the Court.

Respectfully submitted,

Sanford James McCullough
Defendant

NO. 3442-C

The State Of Texas	)	In The 251st Judicial
vs.	)	District Court In And For
Sanford James McCullough	)	Randall County, Texas

JUDGMENT

On the 11th day of December, 1980, the above entitled and numbered cause was regularly reached and called for trial, and came the State of Texas by her Criminal District Attorney, Randall L. Sherrod, and her Assistant Criminal District Attorney, Wesley G. Clayton, and the defendant, SANFORD JAMES McCULLOUGH, appeared in person in open court, his counsel, John Mann, also being present, and the said defendant, SANFORD JAMES McCULLOUGH, having been duly arraigned, and having pleaded not guilty to the indictment herein, both parties announced ready for trial; and thereupon a jury, to-wit: Lewis J. Tversky and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read and the defendant's plea of not guilty thereto, and having heard the evidence submitted, the Court's charge, and the argument of counsel, retired in charge of the proper officer to consider its verdict, and afterward was brought into court by the proper officer, the defendant and his counsel being present, and returned into open court the following verdict, which was received by the Court and is now entered upon the Minutes of this Court, to-wit:

> "We, the jury, find the defendant, SANFORD JAMES McCULLOUGH, guilty of the offense of murder as alleged in the indictment.
>
> */s/ Lewis J. Tversky*
> Foreman of the Jury."

Thereupon the Court, having heard additional evidence on the issue of punishment and the argument of counsel for the State and for the defendant, assessed the punishment of the defendant at confinement in the Texas Department of Corrections for a term of fifty (50) years.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the defendant, SANFORD JAMES McCULLOUGH, is guilty of the offense of Murder, as charged in the indictment and as found by the jury, said offense having been committed on the 5th day of April, 1980, and that he be punished by confinement in the Texas Department of Corrections for a term of fifty (50) years; and that the State of Texas do have and recover of said defendant all costs in this proceeding incurred, for which let execution issue, and that the said defendant be remanded to jail to await the further orders of the Court herein.

THE COURT FURTHER FINDS that the defendant exhibited a deadly weapon as defined in §1.07(a)11, Texas Penal Code, during the commission of this felony offense.

THE COURT FURTHER FINDS that the deadly weapon used or exhibited by the defendant was a knife.

Naomi Harney
Judge Presiding

NO. 3442-C

The State Of Texas	X	In The 251st District
vs.	X	In And For
Sanford James McCullough	X	Randall County, Texas

SENTENCE

On this the 29th day of December, 1980, this cause being again called, the State appeared by her Assistant Criminal District Attorney, and the defendant, SANFORD JAMES McCULLOUGH, accompanied by his attorney, John Mann, was brought into open court, in person, and in charge of the Sheriff, for the purpose of having a sentence of law pronounced in accordance with the Judgment to be rendered and entered against him on the 11th day of December 1980.

And thereupon the defendant, SANFORD JAMES McCULLOUGH, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and the defendant having waived the ten days allowed for sentencing and agreed to accept sentence this date, whereupon the Court proceeded, in the presence of the said defendant, SANFORD JAMES McCULLOUGH, and his attorney, John Mann, to pronounce sentence, as follows:

IT IS THE ORDER OF THIS COURT that the defendant, SANFORD JAMES McCULLOUGH, who has been adjudged, guilty of the offense of murder, said offense having been committed on the 5th day of April, 1980, and whose punishment has been assessed at fifty (50) years confinement in the Texas Department of Corrections, be delivered by the Sheriff of Randall County, Texas, immediately to the Department of Corrections of

the State of Texas, or other person authorized to receive such convicts, and the said SANFORD JAMES McCULLOUGH shall be confined in said penitentiary for not less than five (5) years nor more than fifty (50) years, in accordance with the provisions of the law governing the penitentiaries of said State:

_____

_____

_____

and the said SANFORD JAMES McCULLOUGH is remanded to jail until said Sheriff can obey the directions of this sentence. And the defendant was informed of his right to appeal and that he was entitled to have counsel appointed by the Court to perfect an appeal if he could not afford to employ counsel for said appeal; and the defendant stated that he did wish to appeal his case and did not wish to have counsel appointed.

Naomi Harney
Judge Presiding

NO. 3442-C

The State Of Texas	X	In The 251st Judicial
vs.	X	District Court In And For
Sanford James McCullough	X	Randall County, Texas

MOTION FOR FINDINGS OF FACT

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now SANFORD McCULLOUGH, Defendant in the above styled and numbered cause, and respectfully moves the Court to enter, in writing, findings of fact pertinent in the above cause as follows:

I.

1. SANFORD McCULLOUGH respectfully moves the Court to state in the record, in writing, what identifiable data showing what objective conduct on the part of the Defendant, occurring subsequent to the original sentencing proceeding in Cause No. 3237-C, was used by the Court in assessing Defendant's punishment at fifty years' confinement in the Texas Department of Corrections in the above styled and numbered cause, the Defendant having been sentenced to only twenty years' confinement in the Texas Department of Corrections by a jury in Cause No. 3237-C.

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully prays that the Trial Court timely make such findings of fact as requested herein.

Respectfully submitted,

Sanford McCullough
Defendant

A true and correct copy of the above and foregoing has this the 6th day of January, 1981, been furnished to Mr. Randall Sherrod, Criminal District Attorney, Randall County Courthouse, Canyon, Texas, by hand delivery.

John Mann

NO. 3442-C

The State Of Texas	X	In The 251st Judicial
vs.	X	District Court In And For
Sanford James McCullough	X	Randall County, Texas

ORDER IN RESPONSE TO THE DEFENDANT'S MOTION FOR FINDINGS OF FACT

In response to the Defendant's *Motion for Findings of Fact*, this Court finds that the rule prohibiting the assessment of a heavier sentence upon retrial under those circumstances set forth in *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct., 2072 (and the cases following the precedent outlined in *Pearce*) does not apply to this case because the defendant voluntarily elected to have the jury, rather than the judge, set punishment at the first trial. However, in the event that the Honorable Texas Court of Criminal Appeals holds that the *Pearce* doctrine is applicable to the facts of this case, then this Court makes the following findings of fact and conclusions of law solely for the appellate record:

1. Upon retrial, and after the time of the original sentencing proceeding, newly developed evidence, to-wit: the testimony of Carolyn Sue Hollison McCullough and Willie Lee Brown (witnesses who did not testify at the first trial), served to establish the following:

(a) The testimony of these two new witnesses directly implicated the defendant in the commission of the murder in question and showed what part he played in committing the offense.
(b) It also served to corroborate the testimony of Charles McCullough and Dr. Jose Diaz-Esquivel (both of whom testified at the first trial and again upon retrial) and gave added weight to the testimony of

these witnesses.

(c) This new testimony had a direct bearing upon the credibility of three witnesses who testified at the first trial, namely: Charles McCullough, Dennis McCullough, and the defendant himself. The testimony of Carolyn Sue Hollison McCullough and Willie Lee Brown added to the credibility of the State's key witness, Charles McCullough, and detracted from the credibility of Dennis McCullough and the defendant who both testified for the defense.

(d) The testimony of Willie Lee Brown reinforced and lent credence to the testimony of Carolyn Sue Hollison McCullough, and vice versa.

(e) The testimony of these new witnesses shed new light upon the defendant's life, conduct, and his mental and moral propensities.

(f) This testimony had a direct effect upon the strength of the State's case against the defendant, and served to greatly enhance the State's case at both the guilt and punishment phases of the trial.

(g) Finally, their testimony provided the court with new insight as to this particular defendant's propensity to commit brutal crimes against persons and to constitute a future threat to society.

2. Upon retrial the defendant made it known to the court through his own testimony that he had been released from the penitentiary only four months before the murder in question occurred.

3. Upon retrial this court also considered the fact that if the defendant had elected to have the court set his punishment at the first trial, the court would have assessed more than the twenty (20) year sentence imposed by the jury.

4. Upon retrial and after the original sentencing proceeding, two more witnesses (Carolyn Sue Hollison McCullough and Willie Lee Brown) had indicated by their testimony that although the defendant admitted cutting the throat of the victim, he never showed any remorse to them for his acts.

5. The defendant himself upon retrial of a murder case in which the victim was repeatedly stabbed and beaten in a malicious and brutal manner never exhibited any signs of remorse whatsoever at any stage of the proceedings.

6. Upon retrial after having been found guilty of murder for a second time by a jury and after having made known to the court that he had been involved in numerous criminal offenses and had served time in the penitentiary, the defendant never produced, or even attempted to produce, any evidence that he intended to change his life style, habits, or conduct, or that he had made any effort whatsoever toward rehabilitating himself. Again upon retrial, the failed to show this court any sign or intention of refraining from criminal conduct in the future, nor did he give any indication upon retrial that he no longer posed a violent and continuing threat to our society.

Signed and Entered this the 24th day of February, 1981.

Naomi Harney
Judge of the 251st District Court
in and for
Randall County, Texas

NO. 07-81-0141-CR
IN THE COURT OF APPEALS
FOR THE SEVENTH SUPREME JUDICIAL
DISTRICT OF TEXAS, AT AMARILLO
PANEL C
FEBRUARY 3, 1983

SANFORD JAMES McCULLOUGH, APPELLANT
V.
THE STATE OF TEXAS, APPELLEE

FROM THE DISTRICT COURT
OF RANDALL COUNTY;
251ST JUDICIAL DISTRICT; NO. 3442-C;
HONORABLE NAOMI HARNEY, JUDGE

Before REYNOLDS, C.J., and COUNTISS and BOYD, JJ.

Appellant was convicted of murder, § 19.02, Tex. Penal Code Ann. (Vernon 1974), and sentenced to 50 years in the penitentiary. He contends the trial court erred when it (1) refused to grant his motion for change of venue, (2) admitted bloody photographs of his victim, and (3) imposed a greater sentence on retrial than was imposed by the jury when appellant was first tried for the crime. We reform and affirm.

In September, 1980, appellant was convicted of murder and assessed 20 years in the penitentiary by a jury. Subsequently, appellant's motion for new trial was granted and he was tried again in December, 1980. At the second trial, the question of guilt was again tried before a jury, but appellant permitted the trial judge to assess punishment. The judge, who had also presided at the first trial, assessed 50 years in the penitentiary.

In the interim between the first and second trial, appellant moved for a change of venue under art. 31.03, Tex. Code Crim. Pro. Ann. (Vernon Supp. 1981), with supporting affidavits, alleging that there was so great a prejudice against him in the county that he could not obtain a fair trial. The State controverted the motion and the trial court heard evidence from various witnesses. The State presented evidence that appellant could receive a fair trial in the county and appellant presented evidence that he could not. Appellant also introduced evidence of news media coverage of the crime and his first trial and conviction. The trial court's denial of his motion is the basis for his first ground of error.

Where, as here, the propriety of a change of venue is contested, the trial court's resolution of the dispute on its merits after a hearing will be reversed only if the court abused its discretion. McManus v. State, 591 S.W.2d 505, 516 (Tex. Cr. App. 1980). When conflicting evidence on the issue is presented, the court seldom abuses its discretion by denying the motion, Chappell v. State, 519 S.W.2d 453, 457 (Tex. Cr. App. 1975), even if the case has been publicized by the news media. Morris v. State, 488 S.W.2d 768, 771 (Tex. Cr. App. 1973).

In this case, we find no error in the denial of the motion. Credible conflicting evidence was presented and the trial court resolved the conflict against appellant. By doing so, it did not abuse its discretion. Ground of error one is overruled.

By his second ground, appellant contends the trial court erred in admitting seven photographs. The color photographs depict the victim's cuts and wounds and the murder scene, the victim's bedroom, in vivid and gruesome detail.

Appellant advances two arguments against the admissibility of the photographs. First, he says, they were not material because the defense stipulated that the victim was stabbed to death. Second, assuming some of the photographs were admissible, appellant argues that others were cumulative, and introduced only to inflame and prejudice the jury.

In Martin v. State, 475 S.W.2d 265, 267 (Tex. Cr. App. 1972), the general rule for admission of photographs in a criminal case is stated:

> We hold that if a photograph is competent, material and relevant to the issue on trial, it is not rendered inadmissible merely because it is gruesome or might tend to arouse the passions of the jury, unless it is offered solely to inflame the minds of the jury. If a verbal description of the body and the scene would be admissible, a photograph depicting the same is admissible.
> (Footnotes omitted.)

Accord: Terry v. State, 491 S.W.2d 161, 163 (Tex. Cr. App. 1973).

The trial court did not abuse its discretion by admitting the photographs. First, the appellant cannot, by stipulating the cause of death, deprive the State of the duty and function of presenting all relevant evidence to the jury, "nor avoid facing the full facts of the crime." Harrison v. State, 501 S.W.2d 668, 669 (Tex. Cr. App. 1973).

Likewise, we do not agree that some of the photographs were merely cumulative and used solely to inflame and prejudice the jury. The photographs are extremely unpleasant to observe, but that does not make them inadmissible. Martin v. State, *supra*. The first four depict the victim or the scene from different angles and perspectives and aid the fact finder in understanding what occurred at the scene. The last three show the victim after the blood had been cleaned off the body, and aid the fact finder in understanding the medical testimony. Thus, each photograph is material, competent and relevant, depicts matters verbally describable, and clarified or aids in the understanding of other evidence. Ground of error two is overruled.

By his third ground, appellant attacks the punishment assessed on retrial. After the jury assessed twenty years imprisonment in his first trial, appellant moved for a new trial and the State, apparently unhappy because only twenty years was assessed, agreed with the appellant that a new trial should be granted. The trial court then granted the motion. Upon retrial, appellant permitted the trial judge to assess punishment and she assessed 50 years imprisonment. In this court, appellant says the increased punishment violates the constitutional principles stated in North Carolina v. Pearce, 395 U.S. 711 (1969). We agree.

In *Pearce*, the Supreme Court found no constitutional impediment *per se* to the imposition of greater punishment on retrial of a defendant. It was concerned, however, with the possibility that greater punishment on retrial would be assessed solely to penalize a defendant who had successfully sought a new trial. To prevent that occurrence, the Court established a new rule for state courts, in the following language:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives

after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant *be freed* of apprehension of such a retaliatory motivation on the part of the sentencing judge.

In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. *Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.* And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

395 U.S. at 725. (Last emphasis added.)

Later, in Chaffin v. Stynchcombe, 412 U.S. 17 (1973), the Supreme Court limited *Pearce* to cases where the judge determines punishment, by holding that a jury can impose greater punishment upon retrial "so long as the jury is not informed of the prior sentence and the second sentence is not otherwise shown to be a product of vindictiveness." 412 U.S. at 35.[1]

[1] Although *Pearce* places the burden on the trial judge to prove that greater punishment on retrial was based on post-first-trial acts by the defendant, and was not the result of vindictiveness, (and conclusively presumes vindictiveness unless the sentence is properly justified), 395 U.S. at 725, *Chaffin* places the burden on the defendant to prove that the retrial jury was vindictive. 412 U.S. at 35.

As it must, our Court of Criminal Appeals has followed *Pearce* and Chaffin. In State v. Miller, 472 S.W.2d 269 (Tex. Cr. App. 1971), it held that a judge imposed penalty of 99 years, given on retrial after the jury in the first case had assessed 40 years, was illegal when not supported by the affirmative justification required by *Pearce*. It applied the same rule and found unassigned error in Bingham v. State, 523 S.W.2d 948, 949 (Tex. Cr. App. 1975), when the second judge, who assessed greater punishment, did not try the case the first time but was aware of the punishment assessed by the first judge and did not affirmatively support the sentence with the required data. Finally, in Ex parte Bowman, 523 S.W.2d 677 (Tex. Cr. App. 1975), the judge assessed greater punishment on retrial but filed findings of fact in which he attempted to justify the longer sentence. The essence of his findings was that additional evidence at the second trail about the violent nature of the crime and the defendant's prior record justified a longer sentence. In remanding the case of reassessment of punishment consistent with *Pearce*, the court commented, "None of the factors which the trial judge listed as the basis for his increased punishment occurred after the time of the original sentencing." 523 S.W.2d at 679.

The effect of the foregoing authorities on the sentence in this case is obvious. There is no evidence in the record before us of "identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." The trial judge made extensive findings in support of her action but, as in *Bowman*, those properly supported by the evidence relate to the original crime, not to defendant's subsequent conduct. Thus, the increased

sentence was imposed in violation of *North Carolina v. Pearce.*[2] Ground of error three is sustained.

Appellant does not request a remand, asking instead that we reform the judgment to reflect a sentence of 20 years. Because that is the maximum sentence that can be imposed consistent with *Pearce,* the request is granted, the judgment is reformed to assess punishment of twenty years in the Texas Department of Corrections and the sentence is reformed to provide that appellant shall be confined in the Texas Department of Corrections for an indeterminate term of not less that 5 nor more than 20 years.[3] As reformed, the judgment is affirmed.

Richard N. Countiss
Associate Justice

Publish.

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[2] This case demonstrates the excessive scope of *Pearce.* The trial judge filed detailed and valid reasons for the heavier punishment and there is nothing in the record to indicate that the increased punishment resulted from vindictiveness. However, the reasons affirmatively supported by evidence are based on events occurring during or after the crime but before the first trial. Although those matters were not brought out at the first trial, they cannot be used to increase punishment because none occurred *after* the first trial. Thus, the Supreme Court has established a conclusive presumption that the judge is vindictive if increased punishment is not based on post-first-trial acts by the defendant.

[3] Because we are reforming a sentence entered prior to repeal of the indeterminate sentence law, compare art. 42.09 § 1, Tex. Code Crim. Pro. Ann. (Vernon 1979), with art. 42.09 § 1, Tex. Code Crim. Pro. Ann. (Vernon Supp. 1981), we have imposed the indeterminate sentence that should have been imposed by the trial court.

NO. 07-81-0141-CR
IN THE COURT OF APPEALS
FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT AMARILLO
PANEL C
MARCH 18, 1983

SANFORD JAMES McCULLOUGH, APPELLANT
V.
THE STATE OF TEXAS, APPELLEE

FROM THE DISTRICT COURT
OF RANDALL COUNTY;
251ST JUDICIAL DISTRICT; NO. 3442-C;
HONORABLE NAOMI HARNEY, JUDGE

Before REYNOLDS, C.J., and COUNTISS and BOYD, JJ.

ON MOTION FOR REHEARING

In a well-reasoned brief in support of its motion for rehearing, the State suggests we erred in applying the principles of North Carolina v. Pearce, 395 U.S. 711 (1969), to the facts of this case. While we are satisfied that our conclusions were correct, and observe that most of the State's arguments were answered either directly or inferentially in our original opinion, two matters require additional discussion.

The State argues that this case materially differs from *Pearce* because this appellant was granted a new trial by

the trial judge, not by an appellate court. Although that is a difference, it is not a distinction. The purpose of *Pearce* is to forbid vindictiveness against a defendant who successfully pursues post-conviction remedies. As quoted from *Pearce* in our original opinion, due process "requires that vindictiveness against a defendant *for having successfully attacked his first conviction* must play no part in the sentence he received after a new trial." 395 U.S. at 725 (Emphasis added.) It is immaterial whether the new trial is obtained by an order from the trial court or by a judgment of an appellate court; the principles stated in *Pearce* still must be observed on retrial.

The State also contends, alternatively, that the trial judge complied with *Pearce* because her findings pinpoint identifiable conduct of the defendant occurring after the first sentencing proceeding. Specifically, says the State, she found an absence of remorse and indications of a life style by appellant that justified a greater sentence. Assuming *arguendo* that those findings articulate the kind of identifiable conduct contemplated by *Pearce*, we are unable to discern any evidence, i.e., "objective information," in the record affirmatively establishing the occurrence of those matters within the requisite time frame. As previously discussed, *Pearce* requires (1) objective information (2) of identifiable conduct (3) by the defendant (4) occurring after the time of the original sentencing proceeding. 395 U.S. at 725. Element (4), at least, was not proven.

We have carefully considered all matters raised by the State in its motion for rehearing, but are satisfied we have correctly applied precedents we are required to follow. The motion for rehearing is overruled.

Richard N. Countiss
Associate Justice

SANFORD JAMES McCULLOUGH, Appellant

NO. 351-83 v.

THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Court of Appeals, Seventh Supreme Judicial District of Texas (Potter County)

OPINION ON DISCRETIONARY REVIEW ON THE COURT'S OWN MOTION

Appellant was convicted of murder in September 1980 and assessed punishment at 20 years confinement by the jury. Subsequently appellant's motion for new trial was granted and upon re-trial, appellant was again found guilty by a jury. Appellant elected to have the court assess punishment at the second trial, and the trial judge, who had presided at the first trial, assessed punishment at 50 years confinement. On appeal, the Amarillo Court of Appeals found that the increased punishment assessed by the court violated the principles of North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969).[1] The Court did not remand the case but instead granted appellant's requested reformation of the punishment to 20 years. See McCullough v. State, ___ S.W.2d ___. We granted review on our own motion under Art. 44.45(a), V.A.C.C.P. to determine the authority of the Court of Appeals to reform the punishment.

Art. 44.24(b), V.A.C.C.P., provides:

> "(b) The courts of appeals and the Court of Criminal Appeals may affirm the judgment of the court below, or may reverse and remand for a new trial, or may reverse and dismiss the case, or may reform and correct the judgment or may enter any other appropriate

order as the law and nature of the case may require."

In Bogany v. State, ___ S.W.2d ___ (Del. November 17, 1983), we held that the authority of a court on appeal to reform a judgment under Art. 44.24, supra, does not extend to the situation where the error involves punishment unauthorized by law. A judgment or sentence may only be reformed "to cause those instruments to reflect the true finding of the fact finder when such a finding is reflected in the verdict or, in a bench trial, the pronouncement of the court's finding." Milczanowski v. State, 645 S.W.2nd 445, 447 (Tex. Cr. App. 1983).

In the instant case the judgment of the trial court assessing 50 years confinement was found by the Court of Appeals to be unauthorized under North Carolina v. Pearce, supra. As such, the Court of Appeals was unable to reform the punishment and should have remanded the cause to the trial court for the proper assessment of punishment.[2]

Accordingly, the judgment of the Court of Appeals is reversed. The cause is remanded for assessment of punishment by the trial court in accordance with North Carolina v. Pearce, supra.

TOM G. DAVIS, Judge

(Delivered December 7, 1983)

EN BANC

[1] Appellant's other grounds of error were overruled by the Court of Appeals.

[2] Such procedure has been followed in opinions of this Court which have involved unlawful punishments under North Carolina v. Pearce, supra. See e.g., Lechuga v. State, 532 S.W.2d 581 (Tex. Cr. App. 1976); Ex parte Bowman, 523 S.W.2d 677 (Tex. Cr. App. 1975); Payton v. State, 506 S.W.2d 912 (Tex. Cr. App. 1974).

SANFORD JAMES McCULLOUGH, Appellant
NO. 351-83 vs.
THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Court of Appeals, 7th Sup. Jud. Dist. RANDALL County

OPINION ON STATE'S MOTION FOR REHEARING ON PETITION FOR DISCRETIONARY REVIEW

The question presented on state's motion for rehearing is whether the presumption of vindictiveness established by North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), when a greater sentence is imposed following retrial, is applicable where a jury assesses punishment at the first trial, and a judge assesses punishment upon retrial.

In *Pearce,* a defendant who obtained a reversal of his conviction on appeal received a longer sentence from a judge on retrial than that originally imposed by the judge in the first trial. The United States Supreme Court stated that it would be a violation of the Due Process Clause of the Fourteenth Amendment for a trial court to impose a heavier sentence upon a reconvicted defendant "for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside." 89 S.Ct. at 2080. The Court noted, however, that "[t]he existence of a retaliatory motivation would, of course, be extremely difficult to prove in any individual case." Id., n. 20. Thus the Court found it necessary to establish a prophylactic rule to protect defendants from actual vindictiveness as well as from the reasonable apprehension of vindictiveness that could deter a defendant from appealing a conviction:

"Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge."

"In order to assure the absence of such a motivation, we have concluded that *whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.* And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." Id., 89 S.Ct. 2080, 2081.

Simply stated, the rule of *Pearce* is that a greater sentence given by a judge after a new trial is presumptively vindictive, and therefore illegal, unless the judge affirmatively bases the increased sentence on identifiable conduct[1] on the part of the defendant occurring after the time of the original sentencing proceeding.

In the instant case appellant was convicted of murder in September 1980, and assessed punishment at 20 years' confinement by a jury. Appellant subsequently moved for a new trial alleging that the trial judge erred in not granting appellant's motions for mistrial asserted for improper jury argument and the prosecutor's cross-examination of a witness regarding a co-defendant's confession. The trial court granted the motion for new trial, and appellant was retried for the same offense, *before the same judge who presided at the first trial.* At the second trial the jury again found appellant guilty of murder. Unlike the first trial, however, appellant did not request jury sentencing, and therefore, the trial court was required to assess punishment under Art. 37.07, Sec. 2(b), V.A.C.C.P., which provides in pertinent part:

> "[I]f a finding of guilty is returned, it shall then be the responsibility of the judge to assess punishment applicable to the offense; provided, however, that . . . in . . . cases where the defendant so elects in writing at the time he enters his plea in open court, the punishment shall be assessed by the same jury."

The trial court assessed punishment at 50 years, overruling appellant's contention that the 30 year increase in

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[1] The Supreme Court recently held that under *Pearce*, a sentence may be increased on retrial based on an intervening *event*, as well as on intervening *conduct*. Wasman v. United States, ___ U.S. ___, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). In *Wasman*, the Supreme Court upheld an increased sentence on retrial, where the intervening "event" relied on for the increased sentence was a conviction for a different offense, rendered after the first trial, but for conduct committed before the first trial, where the trial court stated that such conduct was not considered at the first sentencing proceeding.

sentence contravened the holding in North Carolina v. Pearce, supra. After assessing punishment and sentencing appellant, the trial court entered an order in response to appellant's motion for findings of fact. In the order the trial court stated that it found *Pearce* inapplicable to the instant case "because the defendant voluntarily elected to have the jury, rather than the judge, set punishment at the first trial." The court also set out findings of fact attempting to justify the increased sentence for the record in the event that *Pearce* was found to be applicable on appeal.

The Court of Appeals found *Pearce* to be applicable, and also found that the trial court's findings of fact did not satisfy *Pearce*. Accordingly, the Court of Appeals held that the increased sentence was illegal, and reformed the sentence from 50 years to 20. We initially reviewed the Court of Appeals' opinion on our own motion solely to determine the authority of the Court of Appeals to reform the punishment. We held that the Court of Appeals was without authority to reform a sentence "unauthorized by law" and remanded the cause to the trial court for resentencing in accordance with *Pearce,* supra.

The state does not contend on rehearing that the trial court's findings of fact in support of the increased sentence satisfy *Pearce*. Cf. Wasman v. United States, ___ U.S. ___, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). Rather, the state asserts that *Pearce* is inapplicable when a jury first assesses punishment and a judge subsequently assesses punishment upon retrial.

It is clear that the rule of *Pearce* is not applicable when upon retrial, a *jury* renders a higher sentence than originally imposed at the first trial. Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 412 U.S. 17 (1973); see also Casias v. State, 452 S.W.2d 483; Gibson v. State, 448 S.W.2d 481. However, in holding *Pearce* inapplicable to jury resentencing, the Supreme Court in *Chaffin* noted three important distinctions: The Court stated that "[t]he first prerequisite

for the imposition of a retaliatory penalty is knowledge of the prior sentence." *Chaffin,* supra, 93 S.Ct. at 1982. In *Chaffin*, it was conceded that the jury was not informed of the prior sentence, and thus this first prerequisite was not present. The Court specifically noted, however, that "[t]he State agreed at oral argument that it would be improper to inform the jury of the prior sentence and that *Pearce* might be applied in a case which, either because of the highly publicized nature of the prior trial or because of some other irregularity, the jury was so informed." Id., at 1983, n. 14.

The second distinguishing factor noted by the Supreme Court in jury resentencing is that "the second sentence is not meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required a reversal of the conviction." Id. at 1983. Finally, the Court noted that "the jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals."

Applying these factors to the case at bar, we find that the three important considerations of *Pearce* found inapplicable to jury resentencing in *Chaffin* are all present here: first, the trial judge obviously knew the sentence pronounced by the jury at the first trial, since she presided over the first trial. Second, the second sentence was in fact "meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required" a new trial. Finally, since the trial judge assessed punishment on retrial, the third element cited in *Chaffin* above is also present.

The state concedes that we have held *Pearce* to be applicable to precisely the same facts in Miller v. State, 472 S.W.2d 269. The state urges that *Miller* was wrongly decided. In light of the explicit language of *Chaffin,* supra, however, we cannot agree.

The fact that under Art. 37.07, Sec. 2(b), supra, appellant had a right to have the jury assess punishment on retrial, and chose not to do so, does not affect our determination; nor is it important that appellant chose to have the jury assess punishment at the first trial. As long as the Legislature allows defendants to elect between jury or judge punishments, defendants should be allowed to make that choice without fear of vindictiveness.

The state next suggests that through its decisions in Moon v. Maryland, 398 U.S. 319, 90 S.Ct. 1730, 26 L.Ed.2d 262 (1970), (*Pearce* held inapplicable where defendant conceded no vindictiveness present); Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972) (*Pearce* held inapplicable in two-tier system involving trial de novo); and Michigan v. Payne, 412 U.S. 47, 93 S.Ct. 1966, 36 L.Ed.2d 736 (1973), (*Pearce* held not retroactive); the Supreme Court has retreated from the holding in *Pearce* and that *Pearce* is perhaps no longer viable. This contention is without merit. See Wasman v. United States, supra note 1, 104 S.Ct. 3217 (1984).[2]

The state's final contention is that *Pearce* is inapplicable "to a situation where a different sentencing authority assesses the punishment on retrial." Thus the state challenges the validity of our decision in Bingham v. State, 523 S.W.2d 948, where we held *Pearce* to be applicable when a judge assessed punishment at the first trial, and a different judge assessed a greater punishment upon remand. The state apparently overlooks the fact that in *Pearce* itself, a different judge assessed the punishment upon retrial. See

[2] Indeed in *Wasman*, in response to dicta in Chief Justice Burger's plurality opinion that *Pearce* only prohibits increased sentences based on *actual vindictiveness*, five Justices concurred, stating in substance that the *Pearce* presumption is not simply concerned with actual vindictiveness, but is also intended to protect against the reasonable apprehension of vindictiveness that could deter a defendant from seeking a new trial.

State v. Pearce, 145 S.E.2d 918; State v. Pearce, 151 S.E.2d 571; see also Chaffin v. Stynchcombe, supra, 93 S.Ct. at 1990, n. 4 (dissenting opinion).

In light of the foregoing, we conclude that the prophylactic rule set out in North Carolina v. Pearce, supra, is applicable to the instant case, and thus the state's contention on rehearing is overruled.

The state also asserts that we wrongly held on original submission that the Court of Appeals was without authority to reform appellant's sentence. We are convinced that this issue was properly decided on original submission and overrule this contention.

The state's motion for rehearing is overruled.

ODOM, Judge

(Delivered December 5, 1984)

En Banc

Article 37.07
Texas Code of Criminal Procedure

Art. 37.07. [693] [770] [750] *Verdict must be general; separate hearing on proper punishment*

Section 1. (a) The verdict in every criminal action must be general. When there are special pleas on which a jury is to find they must say in their verdict that the allegations in such pleas are true or untrue.

(b) If the plea is not guilty, they must find that the defendant is either guilty or not guilty, and, except as provided in Section 2, they shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty.

(c) If the charging instrument contains more than one count or if two or more offenses are consolidated for trial pursuant to Chapter 3 of the Penal Code, the jury shall be instructed to return a finding of guilty or not guilty in a separate verdict as to each count and offense submitted to them.

Sec. 2. (a) In all criminal cases, other than misdemeanor cases of which the justice court or municipal court has jurisdiction, which are tried before a jury on a plea of not guilty, the judge shall, before argument begins, first submit to the jury the issue of guilt or innocence of the defendant of the offense or offenses charged, without authorizing the jury to pass upon the punishment to be imposed.

(b) *Except as provided in Article* **37.071,** *if a finding of guilty is returned, it shall then be the responsibility of the judge to assess the punishment applicable to the offense;*

provided, however, that (1) in any criminal action where the jury may recommend probation and defendant filed his sworn motion for probation before the trial began, and (2) in other cases where the defendant so elects in writing at the time he enters his plea in open court, the punishment shall be assessed by the same jury. If a finding of guilty is returned, the defendant may, with the consent of the attorney for the state, change his election of one who assesses the punishment.

(c) Punishment shall be assessed on each count on which a finding of guilty has been returned.

Sec. 3. Evidence of prior criminal record in all criminal cases after a finding of guilty.

(a) Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to the prior criminal record of the defendant, his general reputation and his character. The term prior criminal record means a final conviction in a court of record, or a probated or suspended sentence that has occurred prior to trial, or any final conviction material to the offense charged.

(b) After the introduction of such evidence has been concluded, and if the jury has the responsibility of assessing the punishment, the court shall give such additional written instructions as may be necessary and the order of procedure and the rules governing the conduct of the trial shall be the same as are applicable on the issue of guilt or innocence.

(c) *In cases where the matter of punishment is referred to the jury, the verdict shall not be complete until the jury has rendered a verdict both on the guilt or innocence of the defendant and the amount of punishment, where the jury finds the defendant guilty. In the event the jury shall fail*

to agree, a mistrial shall be declared, the jury shall be discharged, and no jeopardy shall attach.

(d) *When the judge assesses the punishment, and after the hearing of the evidence hereinabove provided for, he shall forthwith announce his decision in open court as to the punishment to be assessed.*

(e) Nothing herein contained shall be construed as affecting the admissibility of extraneous offenses on the question of guilt or innocence.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722. Amended by Acts 1967, 60th Leg., p. 1839, ch. 659, § 22, eff. Aug. 28, 1967; Acts 1973, 63rd Leg., p. 968, ch. 399, § 2(A), eff. Jan. 1, 1974; Acts 1973, 63rd Leg., p. 1126, ch. 426, art. 3, § 2, eff. June 14, 1973.

COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
NUMBER 0351-83

Sanford James McCullough

vs.

THE STATE OF TEXAS

On this 20th day of February, 1985, came on to be considered the motion of the State Prosecuting Attorney for leave to file and State's Second Motion for Rehearing.
AND SUCH MOTION IS HEREBY DENIED.

IT IS SO ORDERED.

PER CURIAM

Motion to Stay Mandate Granted. Mandate stayed for 30 days.

A TRUE COPY ATTEST:

THOMAS LOWE, CLERK
COURT OF CRIMINAL APPEALS

BY: *Sherrie Ericson*
DEPUTY CLERK